

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

HESHAM M. ABDALLA,  
  
Plaintiff,

3:14-CV-01174-BR  
  
OPINION AND ORDER

v.

CAROLYN W. COLVIN,  
Commissioner, Social Security  
Administration,  
  
Defendant.

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**BROWN, Judge.**

This matter comes before the Court on Plaintiff's Motion (#15) to Amend or Alter Opinion and Judgment, Rule 59(e). For the reasons that follow, the Court **DENIES** Plaintiff's Motion.

#### **BACKGROUND**

Plaintiff Hesham M. Abdalla sought judicial review of a final decision of the Commissioner of the Social Security Administration (SSA) in which she denied Plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) under Titles XVI and II of the Social Security Act.

On July 16, 2015, the Court entered an Opinion and Order in which it affirmed the decision of the Commissioner. On July 16, 2015, the Court entered a Judgment affirming the Commissioner and dismissing this matter.

On August 13, 2015, Plaintiff filed a Motion to Amend or Alter Opinion and Judgment. The Court took Plaintiff's Motion

under advisement on September 6, 2015.

### **STANDARDS**

"[A] Rule 59(e) motion is an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Wood v. Ryan*, 759 F.3d 1117, 1121 (9<sup>th</sup> Cir. 2014)(quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9<sup>th</sup> Cir. 2000)). "A district court may grant a Rule 59(e) motion if it 'is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" *Id.* (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9<sup>th</sup> Cir. 1999)). The district court may disregard arguments made for the first time on a motion under Rule 59(e). *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9<sup>th</sup> Cir. 2001).

### **DISCUSSION**

Plaintiff asserts this Court committed clear error in its July 16, 2015, Opinion and Order when it (1) found there was not any apparent unresolved conflict between Plaintiff's limitation to occasional overhead reaching bilaterally and the jobs identified by the vocational expert (VE) and (2) concluded the finding of the Administrative Law Judge (ALJ) at Step Three was supported by substantial evidence in the record.

#### **I. Step Five**

In its July 16, 2015, Opinion and Order the Court noted the ALJ posed a hypothetical to the VE at the administrative hearing that included all of the limitations the ALJ found to be credible. Based on that hypothetical the VE testified a claimant with those limitations could perform the jobs of security guard, assembler, timekeeper, and data-entry clerk. The ALJ asked the VE twice if there was any conflict between the VE's findings and the DOT, and the VE testified there was not any conflict. Plaintiff, however, asserted in his pleadings filed in this Court that the jobs identified by the VE required frequent reaching even though Plaintiff's residual functional capacity (RFC) included the limitations of no more than occasional bilateral reaching overhead. According to Plaintiff, therefore, the jobs identified by the VE were inconsistent with the medical evidence.

The Court noted judges in this district have rejected Plaintiff's argument. *See, e.g., Gregg v. Comm'r of Social Sec.*, No. 3:13-CV-01215-TC, 2014 WL 4101739, at \*3 (D. Or. Aug. 11, 2014) ("Plaintiff argues . . . the ALJ relied on erroneous vocational expert opinion because . . . he limited plaintiff with respect to 'overhead reaching,' [but] the [VE] identified jobs that require 'frequent reaching' according to the [DOT]. . . . The [DOT, however,] is silent with respect to the type of reaching involved in the jobs identified in that it only identifies 'reaching' in general. Accordingly, the ALJ did not

err."); *Price v. Colvin*, 6:13-CV-01137-PK, 2015 WL 363312, at \*7 (D. Or. Jan. 23, 2015)(same). The Court found "the reasoning of . . . Gregg[] and *Price* to be persuasive and on the basis of that reasoning conclude[d] the ALJ did not err when she relied on the testimony of the VE with respect to Plaintiff's ability to perform other jobs that exist in the national economy." Opin. and Order at 16. The Court also found the reasoning in *Ketelboeter v. Astrue*, 550 F.3d 620 (7<sup>th</sup> Cir. 2008),<sup>1</sup> to be persuasive. Plaintiff has not identified a Ninth Circuit case that supports his argument. Instead Plaintiff points only to other cases decided in this district in which judges reached a conclusion opposite to that reached in *Gregg*, *Price*, and this Court.

In the absence of any Ninth Circuit precedent, the Court did not commit clear error when it found one line of decisions in this district to be more persuasive than another.

## **II. Step Three**

Plaintiff alleges the Court committed clear error when it found the ALJ's finding at Step Three was supported by substantial evidence. Plaintiff reiterates the arguments contained in his Opening Brief and Reply Brief.

*In Alaska Department of Environmental Conservation v. E.P.A.*

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<sup>1</sup> The Court erroneously identified *Ketelboeter* as a Ninth Circuit case in its citation, but the Court did not rely on *Ketelboeter* as precedent in its reasoning.

the Supreme Court noted "[e]ven when an agency explains its decision with less than ideal clarity, [the court] must uphold it if the agency's path may reasonably be discerned." 540 U.S. 461, 497 (2004)(quotation omitted). Similarly, the Ninth Circuit has noted reviewing courts "are not deprived of [their] faculties for drawing specific and legitimate inferences from the ALJ's opinion." *Magallanes v. Bowen*, 881 F.2d 747, 755 (9<sup>th</sup> Cir. 1989). Here the Court's conclusion is also consistent with *Lewis v. Apfel* in which the Ninth Circuit affirmed the district court's decision and noted the "ALJ [must] discuss and evaluate the evidence that supports his or her conclusion," but there is not any requirement that the ALJ do so under a particular heading. 236 F.3d 503, 513 (9<sup>th</sup> Cir. 2001). Here the Court concluded, based on the context of the ALJ's opinion, that "the ALJ incorporated Dr. Westfall's findings in the ALJ's Step Three finding." The Court, therefore, concludes Plaintiff has not established that the Court committed clear error when it found the ALJ's finding at Step Three was supported by substantial evidence in the record. Thus, after reconsidering Plaintiff's arguments, the Court concludes they do not provide a basis to amend or to alter the Court's Opinion and Order or Judgment.

Accordingly, the Court denies Plaintiff's Motion to Alter or Amend Opinion and Judgment.

**CONCLUSION**

For these reasons, the Court **DENIES** Plaintiff's Motion (#15) to Amend or Alter Opinion and Judgment, Rule 59(e).

IT IS SO ORDERED.

DATED this 8<sup>th</sup> day of October, 2015.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States District Judge